No. 15,320

In the

United States Court of Appeals

For the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FERGUSON, Husband and Wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Reply Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

The Government does not challenge the facts as set forth in Appellants' Statement of the Case. Indeed, the Statement of Facts contained in the Brief for the Appellee (hereinafter designated "B.A." for page reference), though somewhat less detailed, is almost identical.

There are, however, some inaccuracies in the Government's statement. The collision did not occur on June 26, 1955 (B.A. 2), but on June 24, 1955. (R. 3, 6, 11, 14, 36; Exhibit 2) The findings, inadvertantly, also give the date of the collision as June 26, 1955. (R. 28) Dr. Born is described in the Government's Brief (B.A. 3) and in the minutes of the District Court (R. 18) as Dr. Ernest A. Born; in the report-

er's transcript he is referred to as Dr. Dennis Born. (R. 111) Dr. Born did not examine Mrs. Ferguson on June 26, 1955 (B.A. 3), but on June 26, 1956. (R. 112)

REPLY TO GOVERNMENT'S ARGUMENT

I. The Government Has Evaded the Issue of Permanency.

The contention made by Appellants' Specification of Error No. 1, amplified in Argument I., is that Mrs. Ferguson's disability was conclusively shown by the evidence to be permanent. Appellants discuss in detail the evidence in this regard. The Government does not dispute any statement of the evidence made by Appellants on this issue. Neither does the Government cite any evidence which contradicts the fact of permanency.

Instead, the Government completely evades the question by reference to matters immaterial to this appeal.

A. DR. ARNOLD'S PRESENCE WAS NOT NECESSARY.

Reference is made to the absence of Dr. Arnold from the trial "although he was available". The Government does not say that if he were present he would have established lack of permanency. Apparently it would have this Court draw such an inference. The fact is, as shown by the evidence, Dr. Arnold saw Mrs. Ferguson only during the three months immediately following the collision. Since that time she has been under the constant care and treatment of Dr. Walter Brazie, her family physician for several years. (R. 66-70) Dr. Arnold was qualified to state only the immediate effects of the collision on Mrs. Ferguson. His observations and opinions in that regard were in evidence. (Exhibits 1 and 2; R. 42, 51) There could be no one, however, more qualified than Dr. Brazie to testify to the effects of the collision on Mrs. Ferguson either since the three month period immediately following, or in the future.

Incidentally, with Dr. Brazie in Prescott for the trial, Dr. Arnold's presence would have left the City of Kingman, some 170 miles distant, with no other doctors around. (R. 129) For this reason he was not truly available. If he had been available, and if his testimony would have been helpful to the Government, there can be no doubt it would have called him as a witness.

B. THE BASIS FOR DR. BRAZIE'S TESTIMONY WAS EMINENTLY SOUND.

The Government attacks Dr. Brazie's testimony because he did not discuss Mrs. Ferguson's case with Dr. Arnold or Dr. Eisenbeiss and did not see the hospital reports, because he did not do any "clinical" work other than blood pressure readings and urinalysis and because his testimony was based "almost entirely" on the history given him by Mrs. Ferguson. (B.A. 4, 5) The attack is unjustified. More important, it does not aid this Court in determining the issue.

At the risk of repetition, it must be emphasized that Dr. Brazie had been Mrs. Ferguson's family physician for several years prior to the collision and was very familiar with her condition of health. (R. 66-69, 78) Since the three months immediately following the collision Dr. Brazie has made clinical observations and examinations of Mrs. Ferguson every two weeks. (R. 70) By way of laboratory work Dr. Brazie has taken her blood pressure and a urinalysis. (R. 79) No other laboratory tests and consultations are shown to have been necessary or even warranted. (R. 83-84) Dr. Brazie has also observed Mrs. Ferguson's reaction, over an extended period of time, to intensive treatment. (R. 71, 73, 79, 81, 82)

Dr. Brazie's testimony was based on the above, as well as on the history given by Mrs. Ferguson. And the Government does not suggest that the history as given by Mrs. Ferguson was inaccurate.

Again it is worthy to observe that the attack on Dr. Brazie does not produce evidence to justify a finding that Mrs. Ferguson is not permanently disabled.

C. MRS. FERGUSON CONTINUES TO BE DISABLED AS A RESULT OF THE COLLISION.

The Government apparently argues that Mrs. Ferguson is no longer disabled, or if she is, her disability is due to her lack of treatment. (B.A. 5) The argument is without merit. Moreover, the trial court found to the contrary.

Dr. Brazie first discovered that Mrs. Ferguson had high blood pressure in April, 1951. (R. 85) He treated Mrs. Ferguson for her blood pressure on three occasions, after which she did not return for that purpose. (R. 82-83) The reason why she didn't return was because she was not having any trouble with this condition, and it was in no way disabling. (R. 51, 54-55, 68-69, 72-73) Furthermore, Mrs. Ferguson did consult Dr. Brazie from time to time with acute illnesses (R. 74) and he had last seen her as recently as five months before the collision. (R. 76) There was no testimony from which even the slightest inference can be drawn that Mrs. Ferguson's present condition is due to her lack of treatment. The trial court found that it was caused by the collision. (R. 29)

The Government cites, out of context, the testimony of Dr. Brazie that a blood pressure reading which he took three days before the trial was the same as a reading taken a few years before the collision, that at the time of the trial Mrs. Ferguson's condition had improved over what it was shortly after the collision, and that Mrs. Ferguson can now do light housework and possibly baby sitting. (B.A. 5) The Government would apparently have the court believe contrary to all the testimony, that Mrs. Ferguson is no longer disabled.

Dr. Brazie explained that although at times Mrs. Ferguson's blood pressure following the collision was the same as, or even lower, than it had been prior to the collision, intensive treatment has not succeeded in controlling her blood pressure at a constant level, but it is continually up and down. (R. 70-71, 73) Dr. Brazie further explained that while Mrs. Ferguson's disabling symptoms, which persisted at the time of the trial (R. 71-72, 87), had improved since shortly after the collision, they had about become stationary and would not improve sufficiently to enable Mrs. Ferguson to return to a gainful occupation. (R. 72, 80-81) She can perform light housework (R. 81), but she must perform her own and not someone else's. (R. 55-56) Dr. Brazie said she could do baby sitting, "up to a point, depending a great deal on the baby and her reaction to the children". (R. 81) Mrs. Ferguson cannot even enjoy the normal activities of her own grandchildren. (R. 45-46, 62-63)

The trial court awarded Mrs. Ferguson a sum for her loss of earnings not only to the time of trial, but in the future as well. (R. 29) The trial court therefore found that Mrs. Ferguson continued to be disabled at the time of trial.

Even out of context, the testimony of Dr. Brazie referred to by the Government fails to prove that Mrs. Ferguson has no permanent disability. When considered together with all of Dr. Brazie's testimony, there is no room for any inference other than that Mrs. Ferguson's disability is permanent.

D. POSSIBILITIES ARE TOO CONJECTURAL TO SUPPORT A FINDING.

Both Dr. Westfall and Dr. Born testified that there are many instances where persons with hypertension can and have returned to full activity. Dr. Born went further and said that most cases of high blood pressure are controllable. It must be conceded that if ever Mrs. Ferguson's symptoms are cured, she can then return to her former occupation.

The Government relies heavily on these statements. But they are generalities, at best, and do not answer the essential question of whether or not Mrs. Ferguson's symptoms can or will be cured. Dr. Brazie and Dr. Westfall are emphatic that they can not and will not. On the other hand, Dr. Born, undoubtedly realizing his lack of familiarity with Mrs. Ferguson's condition, was most reluctant to, and did not, express any opinion in this regard.

The Government counters with the argument that from the generalities it may be inferred that there is a possibility Mrs. Ferguson will be cured, and the law permits doctors to state possibilities.

Appellants do not agree that in Arizona testimony as to the future consequences of an injury may be stated merely in terms of the possible. In the case of *Southwestern Freight Lines v. Floyd,* 58 Ariz. 249, 119 P.2d 120, the statement that testimony by an *attending* physician regarding possible future consequences is admissible was dicta, for the court also observed (119 P.2d 127):

> "* * * After her injury it is shown she lost her memory to the extent that she could not remember anything of the accident and that she had a change of personality and for a short time headaches—the things the doctor stated might occur and in fact did occur. * * * In this case the answer of the doctor shows he was not speculating or conjecturing, for what he said was possible actually happened. * * *"

Regardless, however, of whether such testimony is admissible, in this case Doctor Born did not state the possibility but left it to be drawn by inference. What value is the inference? The courts have held that it is of no value.

In *Hartford Acc. & Indem. Co. v. Industrial Commission,* 38 Ariz. 307, 299 Pac. 1026, the Arizona Supreme Court, speaking through the same Judge who wrote the opinion in

the *Floyd* case, supra, held that testimony as to the possible effects of an injury is not sufficient to suport a finding that those effects exist.

The Government says (B.A. 7) that *Bowman v. City and County of San Francisco,* 42 Cal. App. 2d 144, 108 P.2d 989, is one of the most quoted cases in point. Appellants, with regret, point out that the case is misquoted in the Government's brief. In the *Bowman* case the question arose as to whether or not plaintiff would later develop epileptic seizures. Plaintiff's doctor testified that he would not say plaintiff was reasonably certain to develop seizures; he would say that they might occur and that he would not be surprised if they did, but he would not say it was reasonably certain. Reading the Government's quotation from this case gives the impression that everything between the quotation marks is as it appears in the opinion. In truth, three sentences are omitted. One of those sentences, skillfully omitted, is a complete answer to the Government's argument. It reads as follows (108 P.2d 1000):

> "* * * The testimony referred to above would not, standing alone, support an award for future consequences. * * *"

E. THE PERMANENCY OF MRS. FERGUSON'S DISABILITY WAS A MATTER ONLY FOR THE EXPERTS.

In certain cases the Arizona Supreme Court has been liberal in upholding a jury award for permanent injuries though there is no corroborating medical testimony, or even medical testimony to the contrary. *City of Phoenix v. Mullen,* 65 Ariz. 83, 174 P.2d 422; *Hirsh v. Manley,* 81 Ariz. 94, 300 P.2d 588. In those cases, however, the court's opinions disclose that there was sufficient evidence, albeit non-expert, to warrant an inference that the injuries were in fact permanent.

If there were sufficient evidence, expert or non-expert, in this case to justify an inference that Mrs. Ferguson's disability is not permanent, we would agree that a finding to this effect would be justified. But that is not the situation. In this case there is direct evidence by two qualified experts that Mrs. Ferguson's disability is permanent, in contradiction of which is, at most, evidence from which it may be inferred that there is a posibility Mrs. Ferguson might recover.

The etiology and pathology of hypertensive heart disease was discussed by the doctors. The treatment was explained and the prognosis given. The complicated workings of the heart and nervous system cannot be within the common knowledge of non-expert laymen. Often even the experts have to rely on an autopsy for proof of their diagnosis. (R. 84)

It therefore follows that the future consequences of Mrs. Ferguson's aggravated hypertension depend essentially on the knowledge, skill and experience of medical experts. This is no subject for which a layman is permitted to substitute his own opinions.

F. THE TRIAL COURT FOUND TOTAL DISABILITY.

The trial court found that the collision and resulting injuries to Mrs. Ferguson caused her "temporary total disability" and awarded her $6,000 for loss of future earnings. (R. 29) The Government says that from these findings it may reasonably be assumed that the trial court felt that Mrs. Ferguson could shortly return to part time work and awarded her $6,000 as compensation for partial loss of wages over a period of years. The Government thereby demonstrates the reason for this appeal and the necessity of a reversal.

There was no evidence that Mrs. Ferguson is only partially disabled. Thus, the trial court found that her disability was "total". Likewise, there was no evidence as to how long, if not permanently, her disability would continue. Yet the trial court found that Mrs. Ferguson's disability was "temporary" and awarded her the equivalent of a little less than two years' earnings.

We respectfully submit that upon reviewing the evidence and the findings, the conclusion is inescapable that the trial court indulged in unwarranted conjecture and speculation.

G. THE GOVERNMENT CONCEDES THE ISSUE OF PERMANENCY.

In its brief the Government argues that the finding of temporary total disability was justified. Instead of demonstrating that there was evidence to support the finding, it evades the issue or refers to evidence on issues resolved, without attack, by the trial court. Appellants suggest that the Government has tacitly conceded that the finding was truly unwarranted.

II. The Evidence Concerning Mrs. Ferguson's Earnings Was Clear and Conclusive.

The evidence established beyond doubt that at the time of the collision Mrs. Ferguson was earning $66.00 per week. (R. 40, 49, 58) The fact that $6.00 a week was given in board instead of cash is immaterial.

Both Mrs. Ferguson and Mrs. Osterman, her employer, testified that Mrs. Ferguson worked only four weeks after the collision. (R. 48, 53, 59)

The testimony in both respects was clear and uncontradicted. The award by the trial court of $3,000 for loss of earnings to the time of trial was arbitrary.

III. Mrs. Ferguson's Pain and Suffering Is Not Denied.

In their Opening Brief, Appellants review in detail the uncontradicted evidence of the many months Mrs. Ferguson has suffered from disturbed memory, weakness, dizziness and extreme nervousness. She cannot work or perform her normal household duties or fully enjoy the company of her grandchildren. The scar above her right eye is permanent.

None of this is denied. The Government merely says that Mrs. Ferguson was only in the hospital six days and that her full medical and hospital damages were only $288.90. Again the Government evades the issue and does not answer it.

Appellants recognize that the trial court must be allowed latitude in assessing damages for pain and suffering. When the latitude is abused it is time for this Court to step in. The award of $1,000 under the circumstances disclosed by this case was grossly inadequate.

IV. Conclusion.

The findings made by the trial court are not sanctified. When the record discloses that a mistake was committed it may reverse erroneous findings by a trial court, even though it would not do so if the findings were made by a jury or administrative agency. *United States v. United States Gypsum Co.*, 68 S. Ct. 525, 541, 333 U.S. 364, 394-395, 92 L.Ed. 746, 765-766.

Due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. In this case not one witness was impeached. Nor even was there an attempt to impeach any witness. Credibility was not involved.

What was involved in the trial court, and what is involved here, is an interpretation of the meaning and effect of the testimony. The testimony is just as much before this Court

as it was before the trial court, and this Court has the same opportunity to appraise it.

Appellants urge that the errors committed by the trial court should be corrected so that Appellants will not be made to suffer the results of a mistake.

Respectfully submitted,

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